

IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA

IN THE MATTER OF FORFEITURE OF WATER )  
RIGHTS UNDER PERMIT 19441, CERTIFICATE )  
5866, APPROPRIATED FROM AN UNDERGROUND )  
SOURCE, PAHRUMP VALLEY ARTESIAN GROUND- )  
WATER BASIN (162), NYE COUNTY, NEVADA. )

RULING

# 4375

GENERAL

I.

Application 19441 was filed by Simkins-Daniels (Partnership) on January 13, 1961, to appropriate the underground waters of the Pahrump Valley Artesian Groundwater Basin for irrigation and domestic purposes within the N $\frac{1}{2}$  SE $\frac{1}{4}$  Section 28, T.19 S., R.53 E., M.D.B.&M.<sup>1</sup> The point of diversion is described as being located within the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 28. A permit was issued under Application 19441 on August 24, 1961, for 1.7 cubic feet per second (cfs).<sup>2</sup> On March 16, 1965, after Proof of Beneficial Use of the waters as allowed under the permit was filed with the Division of Water Resources, the State Engineer issued Certificate 5866 allowing for the diversion of 0.91 cfs, not to exceed of total duty of 400 acre-feet annually (afa), for the irrigation of 80 acres of land within the N $\frac{1}{2}$  SE $\frac{1}{4}$  of said Section 28.<sup>3</sup>

II.

The 80 acre parcel of land identified as the place of use under Permit 19441, Certificate 5866 was subsequently subdivided

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<sup>1</sup>File No. 19441, official records in the Office of the State Engineer.

<sup>2</sup>State's Exhibit No. 7, public administrative hearing before the State Engineer, December 13, 1988. (Hereinafter "Exhibit No. 7").

<sup>3</sup>State's Exhibit No. 7.

into smaller parcels of land.<sup>4</sup> These parcels are identified in the records of the Nye County Assessor as APN 29-641-01 through APN 29-641-05 and APN 29-642-01 through APN 29-642-05 and APN 29-642-07 through APN 29-642-10. These parcels comprise the place of use identified under Permit 19941, the N $\frac{1}{2}$  SE $\frac{1}{4}$  Section 28, T.19 S., R.53 E., M.D.B. & M.

### III.

As identified below, a portion of the water right under Permit 19441 has been abrogated by change applications filed to tie the water to the smaller parcels on land leaving only 20 acres within the NE $\frac{1}{4}$  SE $\frac{1}{4}$  and 40 acres within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  with remaining appurtenant water rights under Permit 19411, Certificate 5866.

Permit 29966 changed the point of diversion of .057 cfs, not to exceed 25 acre-feet annually, of the water appurtenant to the W $\frac{1}{2}$  SE $\frac{1}{4}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 28 (APN 29-642-01 and 29-642-10).

Permit 29967 changed the point of diversion of .057 cfs, not to exceed 25 acre-feet annually, of the water appurtenant to the E $\frac{1}{2}$  SE $\frac{1}{4}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 28 (APN 29-642-07).

Permit 31135 changed the point of diversion of .057 cfs, not to exceed 25 acre-feet annually, of the water appurtenant to the E $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 28 (APN 29-642-05).

Permit 38085 changed the point of diversion and place of use of .057 cfs, not to exceed 25 acre-feet annually, of the water appurtenant to the N $\frac{1}{2}$  SE $\frac{1}{4}$  of said Section 28 tying it more specifically to the W $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 28 (APN 29-642-04).

Application 45969 was filed on July 22, 1982, to change the point of diversion and place of use of 0.114 cfs, not to exceed 50 acre-feet annually, of the water appurtenant to the N $\frac{1}{2}$  SE $\frac{1}{4}$  of said Section 28 tying it more specifically to 10 acres in the S $\frac{1}{2}$  NW $\frac{1}{4}$  SE $\frac{1}{4}$  (APN 29-642-02) of Section 28. Application 45969 became ready for

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<sup>4</sup>See Nye County Assessor's Parcel Map for Blagg Road Estates identified as State's Exhibit No. 10, public administrative hearing before the State Engineer, December 12, 1988, attached hereto.

the action by the State Engineer on December 12, 1982; however, no action was taken pending resolution of the forfeiture issue.

IV.

The State Engineer initially described and designated a portion of the Pahrump Valley Artesian Groundwater Basin on March 11, 1941.<sup>5</sup> The State Engineer subsequently extended the boundaries of the designated area of the Pahrump Valley Artesian Groundwater Basin on January 15, 1948,<sup>6</sup> and on January 23, 1953.<sup>7</sup>

On October 26, 1987, the State Engineer issued Order 955 wherein he found that the groundwater levels in the Pahrump Valley were declining and ordered that all applications filed to appropriate water from the Pahrump Valley Artesian Groundwater Basin in the east side of the basin on the Pahrump and Manse Fans would be denied; all applications for all uses except small commercial uses on the valley floor would be denied; and all applications filed to appropriate water for irrigation purposes on lands in Pahrump Valley that have had a certificated water right forfeited where the forfeiture occurred prior to January 1, 1988, would be considered for approval on an individual basis; however, such applications would only be considered if they had been filed within 60 days of the date the water right had been declared forfeited.

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<sup>5</sup>State Engineer's Order No. 176, dated March 11, 1941, official records in the Office of the State Engineer.

<sup>6</sup>State Engineer's Order No. 193, dated January 15, 1948, official records in the Office of the State Engineer.

<sup>7</sup>State Engineer's Order No. 205, dated January 23, 1953, official records in the Office of the State Engineer.

V.

After all parties of interest were duly noticed by certified mail dated October 17, 1988,<sup>8</sup> an administrative hearing was held with regard to the forfeiture of the remaining waters under Permit 19441, Certificate 5866, on December 13, 1988, at Pahrump, Nevada, before representatives of the Office of the State Engineer.<sup>9</sup>

FINDINGS OF FACT

I.

The State Engineer finds that in order for a water right permit to ripen into a water right certificate the permittee must file proof of the application of the water to beneficial use within the time frame set forth in the permit or the date set by any extension of time granted by the State Engineer.<sup>10</sup> After a certificate is issued on a permit, failure for five successive years on the part of the certificate holder to use beneficially all, or any part of the underground water of the State of Nevada for the purpose for which the right is acquired or claimed, works a forfeiture of the right to the use of that water to the extent of the nonuse.<sup>11</sup>

II.

Based on the records of the Office of the State Engineer, the waters remaining under Permit 19441 are appurtenant to the NW $\frac{1}{4}$  SE $\frac{1}{4}$  and the N $\frac{1}{2}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  (APN 29-641-01, 29-641-02, 29-641-03, 29-641-04, 29-641-05, 29-642-02, 29-642-03, 29-642-08, and 29-642-09.

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<sup>8</sup>State's Exhibit No. 1, public administrative hearing before the State Engineer, December 13, 1988. (Hereinafter "State's Exhibit No. 1".)

<sup>9</sup>Transcript, public administrative hearing before the State Engineer, December 13, 1988. (Hereinafter "Transcript".)

<sup>10</sup>NRS 533.410.

<sup>11</sup>NRS 534.090.

Testimony and evidence presented at the administrative hearing showed that from 1982 through 1986 employees of the Office of the State Engineer physically visited the Pahrump Valley Artesian Groundwater Basin and conducted what are known as groundwater pumpage inventories which documented the use of water for irrigation purposes as allowed under Certificate 5866.<sup>12</sup> The pumpage inventories indicated water was used in 1982, 1983 and 1984 for irrigation on 20 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , and on 10 acres of the 40 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ . The 1985 inventory indicated no use; however, the 1986 pumpage inventory indicated irrigation of 20 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$ .

Testimony and evidence provided by the staff of the Office of the State Engineer was not specific as to which 10 acres was irrigated in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ ;<sup>13</sup> however, based on the other testimony provided<sup>14</sup> the State Engineer finds that the parcel identified as APN 29-642-02 was the 10 acres irrigated during the period of time from 1982 through 1986. The State Engineer finds that irrigation took place on 20 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  and on 10 acres of the 40 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 28. The State Engineer further finds evidence exists of substantial usage of water under Permit 19441, Certificate 5866 during the period of time from 1982 through 1986.

#### CONCLUSIONS

##### I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.<sup>15</sup>

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<sup>12</sup>State's Exhibit No. 2.

<sup>13</sup>Transcript, p. 30.

<sup>14</sup>Transcript, pp. 31, 37-45.

<sup>15</sup>NRS Chapters 533 and 534.

II.

Forfeiture must be demonstrated by clear and convincing evidence.<sup>16</sup> Clear and convincing evidence is that evidence which falls somewhere between a preponderance of the evidence and the higher standard of beyond a reasonable doubt.<sup>17</sup> To establish a fact by clear and convincing evidence a party must persuade the trier of fact that the proposition is highly probable, or must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true.<sup>18</sup>

The State Engineer concludes clear and convincing evidence does not exist to uphold forfeiture of the water right remaining under Permit 19441, Certificate 5866. The State Engineer makes no conclusions as to the status of the water rights from the date of the public administrative hearing to the present time.

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<sup>16</sup>Town of Eureka v. Office of the State Engineer, 826 P.2d. 948 (1992).

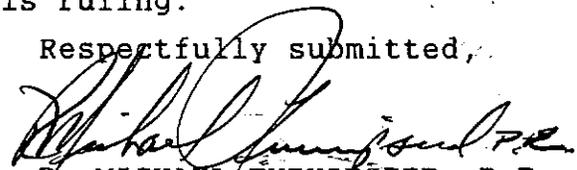
<sup>17</sup>1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

<sup>18</sup>Id. at 239.

RULING

As of the hearing held on December 13, 1988, the right to beneficially use water under Permit 19441, Certificate 5866, has not been forfeited for the purposes for which the subject right was acquired. No finding is made as to the status of the water right under Permit 19441, Certificate 5866 from December 13, 1988, to the present time. Change Application 45969 will be considered on its own merits and separately from this ruling.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/ab

Dated this 22nd day of

July, 1996.